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March 16, 2004

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication: CS Docket No. 98-120

Dear Ms. Dortch:

As this proceeding draws to its conclusion it has become a veritable policy piñata. A number of *ex parte* commenters have weighed in recently with demands that must carry rights (and, in particular, multicast carriage obligations) be conditioned on various public policy "goodies," primarily in the form of programming regulations. Some see it as an opportunity to link new broadcast programming obligations to must carry benefits while others see it as a chance to guarantee a platform from which to launch proposed new digital services. Other commenters have taken a somewhat more subtle approach, attempting to mask their content-based justifications for preferential regulation with generalized language about their "special" status. But whether obvious or not, the common theme of the must carry advocates is that the Commission should base its decision on a desire to promote particular types of content, or to restrict other programming.

A&E Television Networks ("AETN") and Courtroom Television Network LLC ("Court TV"), by their counsel, urge the Commission to reject these proposals as beyond the scope of the 1992 Cable Act and unconstitutional under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*"Turner I"*) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*"Turner II"*). Whether linked to content matters expressly or tacitly, the emerging must carry proposals are inconsistent with the reasoning of both the majority

and dissenting opinions in the *Turner* cases. Any content-based rationale to support must carry and/or multicasting regulations would be rejected unanimously by the Supreme Court as imposing an impermissible burden on cable programmers and operators.[1] But even if the proposed rules are not analyzed as a "burden," the proposals fail under *Turner I* and *II* because they do not promote the governmental interests Congress sought to advance when it enacted Sections 614 and 615 of the 1992 Act.

Because many of the digital must carry proposals would perpetuate and expand the second class status accorded to cable programmers, both AETN and Court TV have participated extensively since this proceeding was initiated in 1998.[2] While some of the specific details of broadcasters' demands have changed over the years, they maintain a common theme – broadcast interests promise to provide great new programming services at some indefinite time in the future if only they are guaranteed "shelf space" on cable systems. Not only are such promises of future programming a long way from the issues Congress addressed in the 1992 Cable Act, the demand for a government guarantee of a platform from which to test new business models is the antithesis of the

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[1] *See, e.g.*, "Why the Commission Should Not Promulgate a Digital Multicast Must-Carry Requirement At This Time Given the Harm Such a Decision Could Inflict On Independent Broadcasters," *Ex Parte* filing of Entravision Holdings, LLC, filed March 1, 2004, pp. 4-5 ("Entravision Ex Parte") (constitutional issues raised by multicast must carry "may be of a different cast and possibly more convincing to the Courts than in the past.")

[2] Comments of A&E Television Networks, CS Docket No. 98-120, Oct. 13, 1998 ("AETN Comments"); Ex Parte Letter from Margaret D. Reilly to Magalie Roman Salas in CS Docket No. 98-120, Nov. 12, 1998; Reply Comments of A&E Television Networks, CS Docket No. 98-120, Dec. 22, 1998 ("AETN Reply Comments"); Comments of A&E Television Networks on Reconsideration, CS Docket No. 98-120, May 25, 2001; Comments of A&E Television Networks, CS Docket No. 98-120, June 11, 2001; Reply Comments of A&E Television Networks, CS Docket No. 98-120, Aug. 16, 2001; Comments of A&E Television Networks, MB Docket No. 03-15, April 21, 2003; Reply Comments of A&E Television Networks, MB Docket No. 03-15, May 21, 2003; Comments of the Courtroom Television Network, CS Docket No. 98-120, Oct. 13, 1998 ("Court TV Comments"); Comments of the Courtroom Television Network, CS Docket No. 98-120, June 11, 2001 ("Court TV 2001 Comments"); Reply Comments of the Courtroom Television Network, CS Docket No. 98-120, Aug. 16, 2001 ("Court TV 2001 Reply Comments"); Ex Parte Letter from Glenn Moss to Chairman Michael K. Powell in CS Docket No. 98-120, Dec. 12, 2002; Comments of the Courtroom Television Network, MB Docket No. 03-15, April 21, 2003; Reply Comments of the Courtroom Television Network, MB Docket No. 03-15, May 21, 2003; Ex Parte Letter from Robert Corn-Revere to Marlene Dortch in CS Docket No. 98-120, Nov. 3, 2003. *See also* Comments of AETN and Court TV, MB Docket No. 03-172, September 11, 2003 at 12-18.

Act's ultimate goal of promoting competition among video services. As AETN and Court TV have pointed out in various filings over the years, the broadcasters' demands for a regulatory preference are the opposite of a competitive system.[3] Cable programmers, like Court TV and AETN, must develop compelling programming and make the necessary investments in order to make the case for carriage in the marketplace, but broadcasters that expect to benefit from the arrangement claim that government must first ensure cable carriage of their multicast channels before they will provide the programming – now promised for over four years.[4] Threatening to withhold or delay active participation in the marketplace without some form of government guarantee to support a new business model cannot be considered "competition" in any meaningful sense.

However, not all broadcasters would be favored under this scheme, a fact that further undermines any argument for multicast carriage because the proposals conflict with the purpose of the must carry provisions of the Cable Act. As Entravision explained in its recent filing, independent broadcasters have "little to gain and much to lose" from the current must carry fight. Entravision Ex Parte at 1. It observed that independent stations lack access to the programming and capital to invest in digital multicast technology now or in the foreseeable future. *Id.* at 2. Entravision concluded the "Commission's current consideration of multicast must-carry is at odds with the values that underpin must-carry as well as the Commission's DTV transition goals and localism initiatives." *Id.* at 12. These comments confirm points that AETN and Court TV have made since the beginning of this proceeding.[5]

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[3] *E.g.*, Reply Comments of Court TV, Aug. 16, 2001 at 6 ("It is indeed a strange conception of 'competition' for an industry that produces few goods to complain that it lacks buyers."); Comments of Court TV, June 11, 2001 at 3-7; AETN Reply Comments, Aug. 16, 2001 at 8-10; AETN Comments, April 21, 2003 at 11-13.

[4] *See, e.g.*, Comments of NAB/MSTV/ALTV in CS Docket No. 98-120, Aug. 16, 2001 at 18 (broadcasters will not develop more digital programming "unless there is some leverage, such as access to the mass market, to unlock the vicious circle preventing the spread of DTV").

[5] *See, e.g.*, AETN Comments at 21-27; AETN Reply Comments at 20-23 ("Analog must carry was designed to assist small or marginal television stations that could not take advantage of retransmission consent. Digital must carry, by sharp contrast, will not help such broadcasters, and is more likely to hurt them."); Court TV 2001 Comments at 12-13 ("Far from achieving a recognized statutory purpose, dual carriage would harm the marginal broadcasters the Supreme Court identified as 'most in jeopardy' of losing a toehold in the market.").

Programming *Quid Pro Quos*

A number of the multicast carriage demands draw an express link between programming requirements and any must carry entitlement. A group calling itself the Children's Media Policy Coalition argued that "any increase in multicasting channel capacity that broadcasters choose to implement should translate into a commensurate increase in the amount of programming available to children."[6] Similarly, the Center for Digital Democracy ("CDD") has expressed its opposition to expanding digital must carry rights (for both commercial and noncommercial broadcasters) "prior to a rulemaking on issues related to revised public interest obligations." CDD stressed that digital must carry can be justified "[o]nly through specifically defining how terrestrial digital commercial broadcasting effectively serves the 'public interest'" though "a range of public interest communication and information."[7] Yet another group called the Center for the Creative Community argued that "the Commission must explicitly link its digital must-carry approval to public interest obligations that increase viewpoint diversity, including a source diversity mandate."[8] Still others – most notably Paxson Communications Corporation – demand multicast carriage out of an express desire to

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[6] Ex Parte Letter from James A. Bachtell to Marlene H. Dortch in MM Docket 00-167, MB Docket 03-15, RM 9832 and CS Docket 98-120, Dec. 17, 2003. The filing advocates retaining the three hour children's programming requirement for each broadcaster's "primary" channel, plus a requirement that three percent of total programming be devoted to educational and instructional programming. While this proposal expressly relies on a content-based rationale, it at least supports the proposition that only one channel represents a broadcaster's "primary video."

[7] Ex Parte Letter from Jeffrey A. Chester to Marlene H. Dortch in CS Docket 98-120, Nov. 7, 2003. *See also* Ex Parte Letter from Jeffrey A. Chester to Marlene H. Dortch in CS Docket 98-120, December 3, 2003 (FCC should "reject any multi-cast must-carry proposals prior to a rulemaking on public interest obligations for digital commercial broadcasters"); Ex Parte Letter from Jeffrey A. Chester to Marlene H. Dortch in CS Docket 98-120, Nov. 19, 2003 ("The networks and the broadcasting industry must provide commensurate public service if they are to receive what surely will be one of the biggest 'give-aways' via publicly conveyed policy.").

[8] Comments of the Center for the Creative Community, MB Docket No. 03-15, CS Docket No. 98-120, Dec. 12, 2003 at 2. The comments fail to specify what form the "public interest obligations" should take, but the same group argued in the broadcast ownership proceeding that the networks should be forced to set-aside a percentage of prime-time programming for "independent" programming producers. The logical connection between this policy proposal and must carry is obscure, except for the fact that the regulation can be used as leverage to extract programming obligations.

censor cable programming they dislike, while seeking a subsidy for themselves in the bargain.[9]

Some other broadcast commenters claim that they should be granted broad digital carriage rights because some stations have promised to provide innovative new services, including various types of multicast channels. Unlike the "public interest" commenters, however, these comments oppose any form of programming mandates as "constitutional folly." They quite rightly observe that "tying DTV cable carriage rules to DTV public interest obligations or applying them to particular types of programming . . . could render the rules 'content-based' and thus likely to fail judicial review under the 'strict scrutiny' standard."[10] Apart from their aversion to programming mandates, these commenters are suggesting nothing more than another form of *quid pro quo* arrangement – they claim to deserve carriage rights based on the value of their proposed programming, but only as long as they are not held to their commitments. As AETN and Court TV both pointed out early in this proceeding, the bottom line of the broadcasters' position in this proceeding has been "regulation for thee but not for me."[11]

Media Access Project ("MAP") appears to agree with the broadcast industry that an explicit link between new public interest obligations for broadcasters and multicast carriage rights would be subject to strict First Amendment scrutiny.[12] But MAP asserts that the Commission could achieve indirectly the same thing it is barred from doing directly simply by changing the order in which it makes its decisions. Thus, MAP argues that the FCC should first require broadcasters to provide "genuine local programming, additional children's programming, access to local and federal

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[9] *Ex Parte* Letter from Paxson Communications Corporation, Docket No. 98-120, February 26, 2004 ("Tell cable and satellite to get the pornography off. They've got room for our multicast channels.").

[10] Ex Parte Letter from Valerie Schulte to Marlene H. Dortch in CS Docket 98-120, Nov. 13, 2003.

[11] AETN Reply Comments, Dec. 22, 1998 at 8-16; Court TV Comments, April 21, 2003 at 19-23 (listing regulatory advantages already accorded broadcasters). For example, despite a stated desire to promote the digital transition, broadcasters consistently opposed any high-definition programming requirements, AETN Reply at 10-11 n.14 (quoting NAB Comments, MM Docket No. 87-268, Nov. 20, 1995 at 1-5.

[12] Ex Parte Letter from Harold Feld to Marlene H. Dortch in CS Docket 98-120 and MB Docket No. 03-15, Jan. 8, 2004 at 1. The MAP letter also states that "simply furthering the digital transition [does] not appear to be a sufficiently compelling purpose" to support mandatory carriage, and it warns the Commission against relying on "the rationale of *Turner* that saving small stations and public broadcasters is, in and of itself, sufficient to serve the public." *Id.* at 1-2.

candidates, and other public interest obligations." Then, since the obligations would be imposed industry-wide, according to MAP, the FCC could find that multicast carriage rights are supported by a compelling interest without imposing an unconstitutional *quid pro quo* condition.[13]

MAP's effort to avoid the appearance of a *quid pro quo* programming arrangement is transparently fallacious. The link between any must carry obligation is not determined by the order in which the FCC implements mandates or even whether the programming obligations are imposed "industry-wide" or station-by-station. The relevant question is whether the FCC's public interest determination is based on programming content, which, under MAP's proposal it most certainly would be. As the Supreme Court made clear, the government cannot use indirect means to "produce a result which [it] could not command directly."[14] The Court frequently is called upon "to look through forms to the substance" of speech regulations, and it undoubtedly would do so here if MAP's approach was adopted.[15] The fact that MAP proposes programming mandates as a wholesale transaction rather than retail does not make it any less of a *quid pro quo* arrangement.

On Being "Special"

Public broadcasters, on the other hand, have raised the question "whether noncommercial educational television broadcasters should be accorded special status with regard to carriage of digital broadcast signals on cable." They assert that noncommercial broadcasting "differs from the commercial broadcast service" because they are providing "extensive noncommercial educational digital services to address diverse needs in their communities" and because the Public Broadcasting Act mandates "the universal distribution of noncommercial educational services to all Americans."[16] The thrust of their argument is that Congress accorded public broadcasters different and "broader carriage rights" than it afforded commercial broadcasters not because of the content of the programming but because of other factors including the history of

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[13] *Id.* at 1.

[14] *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[15] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963). *See also Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (*en banc*).

[16] Ex Parte Letter from APTS, CPB and PBS to Michael K. Powell in CS Docket 98-120, Dec. 8, 2003 at 1 ("Public Broadcasters' December 8 Ex Parte").

institutional support. Accordingly, they ask the Commission to "extend this tradition of special but content-neutral treatment to the issue of digital carriage."

This demand for preferential regulatory treatment (not just with respect to cable networks, but over all other programmers) is no different from the *quid pro quo* arrangements described above. The essential claim is that the government can compel carriage of their service because it is so valuable. The argument that Section 615 of the Cable Act created separate and distinct carriage rights for noncommercial broadcasters as distinguished from Section 614 is not only wrong but begs the question in this proceeding, where neither provision says anything at all about multicast carriage. Additionally, the assertion that a preference for noncommercial broadcasting would be "structural" and not content-based rings hollow where the different structure of public broadcasting is defined by its content.

Public broadcasters are plainly incorrect in suggesting that noncommercial stations deserve multicast must carry rights on the theory that Congress granted them "broader carriage rights" in Section 615 of the Act, as compared with the rights afforded commercial broadcasters in Section 614. *See* Public Broadcasters' December 8 Ex Parte at 2-3. Despite public broadcasters' efforts to show that noncommercial stations have broader must carry rights than commercial stations, precisely the opposite is true, as can be seen simply by comparing the Act's definitions of commercial and noncommercial stations that qualify for must carry status. Under those definitions, a commercial station can be a must carry if the station is "within the same television market as the cable system," while a noncommercial station can be a must carry only if it is licensed to a community within 50 miles of the cable system's headend or if it covers the headend with a Grade B signal. *Compare* 47 U.S.C. §§ 534(h)(a)(A) and 535(l)(2). In television markets such as New York, this means that a commercial station could be a must carry on cable systems as far as 100 miles away from New York City and in the Los Angeles market, a commercial station could be a must carry on systems up to 200 miles from the named community, far exceeding the must carry rights of any noncommercial station.

Furthermore, the Communications Act requires the largest cable systems to carry no more than three noncommercial stations if the programming of any additional stations substantially duplicates the programming of other noncommercial must carry stations. However, the only comparable quantity constraint applying to commercial stations is that such systems need not devote more than one-third of their channel capacity to

must carry stations. *Compare* 47 U.S.C. §§ 534(b)(1)(b) and 535(e). Thus, while the public broadcasters try to characterize the "substantial duplication" limitation of Section 615(e) as an example of "broader" must carry rights, *id.* at 3, this provision actually is an example of a special limitation on noncommercial carriage obligations. These and other distinctions do not substantiate any congressional intent to treat broadcasters differently for must carry purposes based on their commercial versus noncommercial status, but merely reflect a continuation of the separate treatment of such stations in FCC's must carry rules from the mid-1970s, which also granted different must carry rights to commercial television stations.[17]

Not so Special. While the value of noncommercial broadcast programming is not in dispute, the question here is whether the nature of its service can justify preferential carriage under the First Amendment. As explained below, such a claim cannot survive constitutional scrutiny, but even if it could, it is not supported by the facts. Justice O'Connor noted that many cable programming networks have "as much claim as PBS to being educational or related to public affairs." *Turner I*, 512 U.S. at 681 (O'Connor, J., concurring in part and dissenting in part). This observation has been acknowledged by the Commission and supported by independent research.[18] In this regard, both Court TV and AETN have submitted detailed descriptions into this record of their significant

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[17] *Compare* 47 C.F.R. § 76.61(a)(1)(1976) (commercial stations in large markets must be carried on systems within 35 miles) and § 76.61(a)(2)(1976) (noncommercial stations must be carried within their Grade B contours).

[18] *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd. 15,092, ¶ 16 (1998) ("Broadcasting may not be the only source of local programming as cable operators have developed local news channels and public, educational, and governmental access channels, which provide highly localized content, have multiplied in the past six years."). *See also* Eli M. Noam, *Public Interest Programming By American Commercial Television*, in PUBLIC TELEVISION IN AMERICA, 145-176 (Eli M. Noam and Jens Waltermann, eds., 1998). This study examined the growth of public interest programming available on cable television systems in New York City between 1969 and 1997. Professor Noam identified a significant number of cable television networks that provide what he considered to be public interest programming, including A&E Television, Court TV, The History Channel, Bravo, C-SPAN, CNN, CNBC, Disney, Discovery, Fox News Channel, The Learning Channel, The Weather Channel, Mind Extension University and others, including regional news channels. He also identified several channels, such as Black Entertainment Television, that address the interests of ethnic minorities. In total, the number of channels found to provide "primarily public interest programming" was considered to be quite large, representing almost half of the available cable channels. Since that study, even more such channels have been launched, including Biography, History International, National Geographic, Discovery Civilization, Discovery Science, Discovery Kids, and others.

public interest programming efforts.[19] Other cable programming services have done so as well.

In their effort to obtain multicast must carry, public broadcasters struggle to find precedent that might justify affording them favored treatment in this proceeding. For example, the substance of the Public Broadcasters' December 8 Ex Parte is that Congress and others have historically afforded a "special status" to noncommercial broadcasters which somehow translates into encouraging the Commission to grant them multicast must carry rights, even if the Commission were to decline affording such a benefit to commercial broadcasters. However, while AETN and Court TV acknowledge the existence of language in various public broadcasting acts and authorizations recognizing the value and importance of the programming provided by noncommercial broadcasters, nothing suggests that Congress would want the Commission to take the extraordinary step of affording public broadcasters must carry rights for their multiple broadcast streams. Language in an appropriations bill generally encouraging support for noncommercial broadcasting hardly demonstrates Congress' desire to proceed in such a constitutionally dubious manner.

Similarly, government support for so-called "universal service" in the provision of public broadcasting programming means little in the multicast must carry context. Public broadcasters stretch credulity in suggesting that the substantial government support for public broadcasting "will have been wasted" in the absence of multicast must carry. Public Broadcasters' December 8 Ex Parte at 6-7. Since no requirement has ever existed for a cable operator to carry all of a broadcaster's multicast signals, no government has ever spent a dime in the expectation that its money would be used for such a purpose. To the contrary, public funding for noncommercial broadcasting is intended to support programming, distribution, and viewership of a station's broadcasts (*i.e.*, its primary video signal), not to enable the unprecedented expansion of cable carriage that would result from requiring multicast must carry.

The public broadcasters erroneously suggest there is judicial support for their position in the face of clear precedent invalidating preferential treatment for public broadcasters. *See, e.g., Action for Children's Television v. FCC*, 58 F.3d 654, 668-669 (D.C. Cir. 1995)(*en banc*) ("*ACT III*"). They suggest incorrectly that *ACT III* applies only in the context of

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[19] *See, e.g.*, Court TV Comments, Oct. 13, 1998 at 3-6; Court TV Comments, June 11, 2001 at 9-12; AETN Comments, Oct. 13, 1998 at1-2, 6-13; AETN Comments, June 11, 2001 at 2-3.

indecency regulations, Public Broadcasters' December 8 Ex Parte at 8, but nothing could be further from the truth. The D.C. Circuit in that case relied on Supreme Court precedent striking down preferential tax treatment for certain publications as well as preferential time, place, and manner regulations to support the general proposition that differential treatment between commercial and noncommercial speakers raise significant First Amendment problems. The court merely applied these well-established constitutional concepts to the specific regulations at issue in *ACT III*, just as it would here if the public broadcasters were to prevail in their special pleading before the Commission. There simply is no support for the public broadcasters' assertion that "there is an extraordinary and compelling record of legitimate differential treatment for public television stations when it comes to cable carriage." *Id.* As explained above, if anything, noncommercial must carry rights are more limited. Whatever differences that may exist cannot support the constitutional distinction asserted here.[20]

Finally, as independent broadcaster Entravision noted, broadcasters and others who advocate multicast carriage requirements may place the entire must carry rationale at risk. By trying to push the envelope too far, such advocacy could undermine the narrow support for existing must carry rules. Accordingly, as Entravision pointed out, public broadcasters would be better served by seeking to ensure must carry rights for only a single video feed, and not attempting to expand their regulatory advantage.

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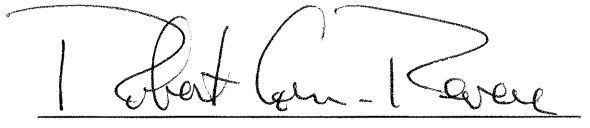
[20] Public broadcasters' citation of *Time Warner Entertainment Co., LP v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) is utterly inapposite. They cite the case for the proposition that the government may favor noncommercial programmers by granting them certain access rights. Public Broadcasters' December 8 Ex Parte at 7. However, the D.C. Circuit in that case held only that a noncommercial set-aside for DBS was constitutional on the theory that, for certain purposes, satellite transmissions may be regulated in much the same way as terrestrial broadcasters. *Id.* at 975 (analyzing DBS set-aside "under the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media"). But this narrow holding was denied *en banc* review only because the D.C. Circuit was deadlocked on the issue. *Time Warner Entertainment Co., LP v. FCC*, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*). By contrast, the Supreme Court in *Turner Broadcasting* made clear that the constitutional standard that applies to broadcasting is inapplicable for cable. *Turner I*, 512 U.S. at 637 ("the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation"). Nothing in the *Time Warner* case supports the proposition advanced here that the First Amendment would support preferential treatment in the context of must carry of certain noncommercial licensees.

Based on the foregoing, we urge the Commission to withstand the myriad demands from broadcasters for special regulatory treatment.

Very truly yours,

Davis Wright Tremaine LLP



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